BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LAURA STEVENSON Claimant	)	
VS.	)	
RUSH COUNTY NURSING HOME Respondent	)	Docket No. 1,056,164
AND	)	
KANSAS ASSOCIATION OF HOMES FOR THE AGING INSURANCE GROUP, INC. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the October 12, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Lawrence M. Gurney of Wichita, Kansas, appeared for claimant. Michael L. Entz of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 12, 2011, preliminary hearing and exhibit thereto; the transcript of the September 20, 2011, discovery deposition of claimant; the transcript of the September 29, 2011, deposition of Mikhail Imseis, M.D., and exhibit thereto; and all pleadings contained in the administrative file.

ISSUES

On March 8, 2011, claimant slipped on ice outside the back door of her home. Claimant was treated by her family physician, Dr. Mikhail Imseis. Dr. Imseis prescribed Lortab and told claimant to return if she did not get better. He did not assign claimant any temporary restrictions. At the time, claimant was employed by respondent. Following the accident, claimant continued to perform her regular job duties for respondent. Claimant

alleges that on March 23, 2011, she reinjured her back, while employed by respondent, when she repositioned a patient. Claimant immediately reported the accident and sought medical treatment.

Claimant alleges the March 23, 2011, incident aggravated her preexisting back condition. Respondent asserts that claimant injured her back at home on March 8, 2011, and suffered no additional back injury on March 23, 2011. In its brief, respondent expresses misgivings concerning claimant's credibility. In a brief, yet succinct Order, ALJ Moore impliedly found that claimant aggravated her pre-existing back injury and stated: "Claimant contends, and it is certainly plausible that she aggravated pre-existing injuries to her low back while performing work duties on March 23, 2011."[1] The ALJ ordered medical expenses incurred after May 6, 2011, not previously paid by health insurance to be paid as authorized medical expenses. He also ordered temporary total disability benefits to be paid at the rate of $275.90 per week from May 31, 2011, until October 4, 2011. Respondent appeals. Therefore, the sole issue to be addressed is:

Did claimant sustain personal injury by accident arising out of and in the course of her employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant began working as a CNA for respondent in October 2010. On March 8, 2011, claimant stepped out the back of her house and slipped, injuring her back. Claimant testified ". . . my bottom hit the step, but I was holding on to the screen when I went down."[2] Claimant testified that she pulled a muscle. "It wasn't bad,"[3] is how claimant described her injury. Claimant indicated that following the accident she had pain radiating down the right side. She saw Dr. Imseis, her family physician, who prescribed Lortab. He told her to return if she continued to have more pain, but ordered no diagnostic tests. Claimant did not return to see Dr. Imseis until March 23, 2011. However, claimant called Dr. Imseis on March 14, 2011, to get another prescription for Lortab as her Lortab was stolen at work.

Claimant has a prior history of low back problems. On October 2, 2008, she went to the emergency room for left-sided low back pain. On October 9, 2009, claimant again went to the emergency room for low back pain. On that occasion she injured her back in

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[1] ALJ Order (Oct. 12, 2011) at 1.

[2] P.H. Trans. at 10-11.

[3] Stevenson Depo. at 12.

a work-related accident at Great Bend Health and Rehabilitation. Claimant received medical treatment only and no permanent restrictions resulted.

On March 23, 2011, claimant was setting up a resident on the side of the resident's bed. The resident began pushing, pitching and fighting, and claimant's back began hurting when she assisted the resident. Claimant testified that prior to this incident she did not have pain on her left side. She also testified the pain from the March 23, 2011, accident was different than the pain she felt after the fall on March 8, 2011. She laid the resident back down and immediately told her team leader, Eric Thiesenhous,[4] about the accident. Claimant testified she was not aware that she was supposed to fill out a written accident report, but was told to report an injury to her team leader, which she did. Claimant called Dr. Imseis from work and then immediately went to see him. She had not been to see him since the March 8, 2011, accident.

Claimant testified that to the best of her knowledge she discussed with Dr. Imseis the incident at work. Dr. Imseis took an x-ray of claimant's lower back and felt she had a compression fracture of L-5. On March 24, 2011, claimant returned to work and explained to Margaret Plante, a superior of claimant's who is above claimant's team leader, what happened. Ms. Plante asked claimant if she had any weight restrictions. Claimant called Dr. Imseis, and he restricted her to lifting no more than 10 pounds. Claimant requested Dr. Imseis fax the restrictions to respondent. Claimant did not request medical treatment from respondent. Respondent sent claimant home on March 24, 2011, and claimant has not worked for respondent since.

At the preliminary hearing, the ALJ ruled that notes from Margaret Plante would be admitted into evidence.[5] They indicate that on March 24, 2011, Dr. Imseis restricted claimant to lifting no more than 10 pounds. Ms. Plante did not want claimant to return to work until the restriction was lifted. The notes of Ms. Plante dated March 29, 2011, state claimant was to undergo an MRI on March 30, 2011. Claimant called the Monday after the MRI and indicated she could not return to work. On April 5, 2011, claimant again called Ms. Plante. During this conversation, claimant stated she would like to claim her accident as workers compensation, but did not know how to do it. Ms. Plante told claimant that she had not previously indicated the injury was work related.

On March 29, 2011, claimant returned to see Dr. Imseis. He prescribed Percocet and ordered an MRI of the lumbar spine. The MRI revealed a posterior central and left disc protrusion and a posterior annular tear at the L4-5 level. On April 1, 2011, Dr. Imseis met with claimant to discuss the MRI results. He referred her to Dr. Vivek Sharma, an

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[4] At claimant's deposition on September 20, 2011, the name is spelled Thielenhaus and at the preliminary hearing it is spelled Thiesenhous.

[5] P.H. Trans. at 7-8.

orthopedic surgeon at Hays Orthopedic Clinic. Because claimant's back pain was so severe, Dr. Imseis also administered an epidural injection between L-4 and L-5.

Dr. Sharma first saw claimant on April 19, 2011. He initially treated claimant conservatively by ordering physical therapy and epidural injections. The May 19, 2011, report of Dr. Jose V. Menendez, who gave claimant the epidural injections, indicates claimant sustained a March 23, 2011, work-related low back injury. Claimant underwent back surgery by Dr. Sharma on July 28, 2011. Claimant's health insurance paid for the surgery. Claimant testified that Dr. Sharma released her to go back to work on October 4, 2011.[6] Claimant testified that Dr. Sharma did not give her specific restrictions, but to listen to her body. Claimant testified that she intended to call respondent to determine if they had work available for her.

Respondent took the deposition of Dr. Imseis. His testimony concerning the March 8, 2011, incident differed from that of claimant. According to Dr. Imseis, claimant reported to him on March 8, 2011, that she "badly"[7] injured her back. He examined claimant, but did not order any diagnostic tests. He did not order an x-ray as claimant had no health insurance and could hardly come up with the money to pay the bill. Claimant complained to Dr. Imseis of right-sided pain radiating along the sciatic nerve.

Dr. Imseis testified that he next saw claimant on March 23, 2011, because her back was bothering her. He indicated that claimant did not report a new injury. However, his note dated March 23, 2011, indicated that claimant reported her back pain was different from when he previously examined her. As indicated above, Dr. Imseis ordered x-rays and later an MRI of the lumbar spine which led to his diagnosis of a left disc protrusion between L-4 and L-5. He opined that claimant suffered the left disc protrusion in the fall at her home on March 8, 2011.

It was acknowledged by Dr. Imseis that on March 8, 2011, claimant complained of right-sided back pain. He testified that usually a left disc protrusion will mean left-sided pain, but when there is a protrusion, a person can hurt on either side.[8] Dr. Imseis testified the MRI revealed claimant had a posterior disc protrusion and a posterior annular tear which would explain the symptomatology on either side of claimant's body.

Dr. Imseis last saw claimant on April 1, 2011. At that time, he referred claimant to Dr. Sharma at Hays Orthopedic Clinic. Dr. Imseis indicated on a Consultation Request for Hays Orthopedic Clinic that claimant's injury was not work related. In June 2011, Dr. Imseis communicated to respondent's counsel that claimant's injury was not work

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[6] *Id.*, at 19-20.

[7] Imseis Depo. at 5.

[8] *Id.*, at 13-14.

related. This was based on his course of treatment and the fact that claimant never told him her injury was work related. However, Dr. Imseis indicated claimant's job duties at respondent could very easily aggravate a condition that results initially from a fall at home.[9]

At the preliminary hearing, claimant testified that three weeks after her surgery, she started working for her landlord, a farmer. She works for him three to four hours a day, two to three days a week at $10.00 per hour. The landlord would deduct the wages from the rent claimant owed him. Claimant's rent is $200.00 per month and her landlord did not require her to pay rent from August through October 2011.

PRINCIPLES OF LAW AND ANALYSIS

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[10] A claimant must establish that his or her personal injury was caused by an "accident arising out of and in the course of employment."[11] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[12] The existence, nature and extent of the disability of an injured workman is a question of fact.[13] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[14] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[15]

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[9] *Id.*, at 23.

[10] K.S.A. 2010 Supp. 44-501(a), *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[11] K.S.A. 2010 Supp. 44-501(a).

[12] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[13] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[14] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[15] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[16] Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[17]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[18] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[19]

The ALJ apparently was satisfied that claimant met her burden of proof that she sustained a personal injury by accident arising out of and in the course of her employment. This Board Member concurs. The parties do not dispute that claimant sustained a lower back injury at home on March 8, 2011. She immediately saw Dr. Imseis, to whom claimant complained of right-sided low back pain. He did not order any diagnostic tests and did not impose any restrictions upon claimant. Claimant returned to her normal work duties.

After the incident at work on March 23, 2011, claimant underwent an MRI which showed a posterior central and left disc protrusion and a posterior annular tear at the L4-5 level. Dr. Imseis opined this injury occurred during the March 8, 2011, accident. However, this opinion perfunctorily ignores several important facts. No diagnostic tests were ordered by Dr. Imseis on March 8, 2011. Therefore, the true nature and extent of claimant's back condition following claimant's fall at home is unknown. What is known is that claimant testified her March 8, 2011, injury "wasn't bad." Dr. Imseis imposed no restrictions and claimant continued to perform her normal work duties after the March 8 incident.

On March 8, 2011, Dr. Imseis told claimant to see him again if the pain worsened. Claimant did not see Dr. Imseis again until she was injured at work on March 23, 2011. Claimant called Dr. Imseis on March 23, 2011, and saw him later that day. Claimant told Dr. Imseis that the back pain was different than when he examined her on March 8, 2011. Dr. Imseis conceded that claimant's job duties could aggravate her prior back condition. The greater weight of the evidence supports a finding that it is more probably true than not that claimant's accident on March 23, 2011, aggravated her preexisting back condition.

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[16] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[17] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[18] K.S.A. 2010 Supp. 44-501(a).

[19] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[20] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[21]

CONCLUSION

Claimant sustained a low back injury by accident arising out of and in the course of her employment with respondent.

WHEREFORE, the undersigned Board Member affirms the October 12, 2011, preliminary hearing Order entered by ALJ Moore.

IT IS SO ORDERED.

Dated this ____ day of January, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
Michael L. Entz, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[20] K.S.A. 44-534a.

[21] K.S.A. 2010 Supp. 44-555c(k).